

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



75-1185

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

DOCKET NO. 75-1185

-against-

CHARLES NELSON,

Appellant.

-----X

BRIEF FOR APPELLANT

PURSUANT TO

ANDERS v CALIFORNIA



HARRY FRACTENBERG  
Attorney for Appellant  
325 Broadway, Suite 515  
New York, N.Y. 10007

## TABLE OF CONTENTS

Question Presented .....	1
Statement Pursuant to Rule 28(3) .....	1
Preliminary Statement .....	1
Statement of Facts .....	2-4
Statement of Possible Legal Issues .....	4-5
Conclusion .....	6

## TABLE OF CASES

U.S. v Malcolm, 432 F2d 809, 812 (2 Cir. 1970).....	5
U.S. v Miranda, 437 F2d 1255, 1258 (2 Cir. 1971).....	5-6
U.S. v Lester, 247 F2d 496, 501 (2 Cir. 1957).....	6
U.S. v Conner, 484 F2d 646 (5 Cir. 1973).....	6



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QUESTIONS PRESENTED

Whether there are any non-frivolous issues to be  
raised on appeal.

STATEMENT PURSUANT TO RULE 28 (3)

PRELIMINARY STATEMENT

Defendant appeals from a judgment of conviction upon  
a plea of guilty to the 2nd count of a two count indictment  
(75-32) rendered on March 10, 1975 by Judge Cannella by the terms  
of which defendant received a sentence of 5 years to run concur-  
rently with a term defendant was then serving in a state institu-  
tion.

### STATEMENT OF FACTS

Defendant was indicted under two counts (74 Cr.1106) for stealing two packages on 11/14/74 from the U.S. Post Office at 365 W 125 Street, NYC., later reduced to one count by court order based on motion made by defendant's attorney.

On 12/21/74 defendant while out on bail, committed another theft of a parcel from the N. Y. Truck Terminal at the N. Y. City Post Office, resulting in a superseding Indictment (75 Cr. 32) being drawn against defendant, consisting as count 1, the two thefts of Indictment 74 Cr. 1106 and the one theft committed thereafter as above stated.

On January 27, 1975 defendant was brought to the Federal Court pursuant to a Writ, from a State Prison, for the commission of another crime, and on that day, defendant desired to plead guilty to the 2nd count of the Superseding Indictment 75 Cr. 32.

At the time of pleading, defendant was advised by the Court in furtherance of Rule 11, of the Rules of Federal Criminal Procedure, that he could get up to 5 years in jail and/or \$2000.00 fine.

The Court further stated: (page 13, line 20 of minutes of hearing on that day)

Q. I am telling you now that I am not making any promises to you other than this, that if I impose a jail sentence, and I don't know whether I will or not, I don't have the probation report and I don't know that much about you, I will consider probation but I don't know whether I will be able to grant it, and I may have to put you away. The most I will promise you is this, that if I do decide you must go away that I will recommend to the Attorney General, which is the most I can do, recommend to the Attorney General



that you be sent to a medical institution, be it Lexington or some other place, where they treat you for the drug addiction until you have received the maximum benefit and then after that, if it is necessary, and you have not finished your time, to a jail type institution. You understand that is as far as I will go in the matter. (1/27/75 minutes p 14 L 10, 11, 12)

The Clerk then read Count 2 to defendant and when finished, asked, "Do you understand the charges" and defendant said, "Yes, sir". (p 16 L19-25, p 17 L2,3,4).

The Court then set 2/24/75 as the date for sentence but on that date defendant did not appear.

Defendant was produced on a Federal Writ after it was ascertained that he was in Riker's Island for the commission of another crime.

On March 10, 1975 defendant was produced before Judge Cannella for sentence.

Defendant told the Court of his drug habit; that he wanted to be sent to an Institution where he would be treated, and the Court said he would do so. (Minutes of 3/10/74 hearing p2 L21-25, p3 L2-9) (p5 L15-22)

The Court then directed defendant to be turned over to the Attorney General for a term of 5 years to run concurrent with the term he was serving in a State Facility, and he recommended that defendant be kept in the Institution which will take care of his drug addiction until he receives the maximum benefit after which he will be returned to a jail type institution. Count 1 of said Indictment was then dismissed on motion.

Immediately thereafter, defendant began prose applications to be relieved of his plea of guilty and sentence of 5 years.

The first such Notice, was dated 3/10/75 and stated,

"I was under the influence of narcotic methadone and I did not know what I was pleading Guilty and additionally, believe that 5 years time is excessive and not in accord with a plea of Guilty, and I further appeal from each and every of the said sentence."

At defendant's request, a Notice of Appeal was filed on 3/17/75 for defendant and again on 3/20/75 inadvertently.

Defendant's pro se applications were treated by the Court as applications for reduction of sentence, and denied in a memorandum decision and order dated April 17, 1975.

Thereafter, defendant made a pro se motion for reconsideration of the decision of 4/17/75.

In a memorandum and order dated and filed June 2, 1975 Judge Cannella denied such motion, and reduced defendant's contentions of improper action respecting Rule 11, and other claims of impropriety made by the Court, by the introduction of pertinent citations attesting to the validity of his sentence.

#### STATEMENT OF POSSIBLE LEGAL ISSUES

1. Has defendant been able to establish grounds for withdrawal of a guilty plea

From the minutes of the hearing of January 27, 1975 it would appear that defendant has not been able to establish grounds for the withdrawal of a guilty plea. On p10 L13 and ending on p 14, defendant stated he knew what he was doing, that he was functioning normally; that he knew he was in a Courthouse and that he was asking the Judge to accept his plea of guilty to Count 2 of the Superseding Indictment, and that he knew that he took property from the mail people, a federal violation, and



after he said he did not know how much time he could get, he was told by the Court the scope was 5 years and/or \$2000.00, and that he understood that to be the punishment, and the Court then asked defendant to tell how he happened to do what he did, and defendant said he had a drug habit, saw these packages in the post office and took them; that he knew he did something wrong, that he was committing a crime and that there was no question in his mind that what he did was wrong.

The Court then found (p16 of said minutes) after all the questioning, that defendant acted voluntarily with an understanding of the nature of the charges against him and that he understood the scope of the punishment.

In view of the extensive questioning by the Court of the defendant and his understanding of the nature of the charges, it would seem difficult to establish grounds for withdrawal of a guilty plea, and at a time when he was apparently drug free.

See: U. S. v Malcolm 432 F2d 809, 812 (2 Cir. 1970)

The safeguards of fundamental fairness make plain that (a defendant) would be entitled to vacation of his plea and conviction if he proved that his mental faculties were so impaired by drugs when he pleaded that he was incapable of full understanding and appreciation of the charges against him, of comprehending his constitutional rights and of realizing the consequences of his plea.

In the instant case, it is believed defendant did not sustain the burden imposed upon him nor reach a level as should require the Court to conduct an evidentiary hearing.

See: U.S. v Miranda 437 F2d 1255, 1258 (2 Cir. 1971)  
cert. denied, 409 U.S. 874 (1972)

Where no evidentiary facts are alleged to support a bald allegation of mental incompetence, a hearing may not be required. On the other hand, where the movant





has raised detailed and controverted issues of fact, a hearing will be required.

It would not seem that Nelson has in any manner met the issues outlined herein.

It would seem that dissatisfied with the sentence imposed, defendant sought a way out.

Such feeling is not a proper or legal basis for withdrawal of a plea of guilty.

See: U.S. v Lester 247 F2d 496, 501 (2 Cir. 1957)

After sentence, it is practically impossible to withdraw a plea of guilty and that could only be done to correct manifest injustice. (Fed. R. Crim P. 32(d) )

Defendant acted voluntarily, promptly responded to the Court's questions and understood the charges and scope of punishment. See: U.S. v Conner 434 F2d 646 (5 Cir. 1973)

#### CONCLUSION

Under the circumstances, it is respectfully requested that an order be made, permitting HARRY FRACTENBERG, to withdraw as assigned attorney for Appellant.

Respectfully Submitted

HARRY FRACTENBERG  
Attorney for Appellant  
325 Broadway, Suite 515  
New York, N. Y. 10007











